Supreme Court, U.S.
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No. 01-455

In the Supreme Court of the United States

GRASS VALLEY TERRACE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, for purposes of the six-year statute of limitations under 28 U.S.C. 2501 for actions in the Court of Federal Claims, a breach of contract action based upon the effect of the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, Tit. II, 101 Stat. 1877, first accrued when that statute was enacted.

2. Whether, for purposes of the six-year statute of limitations under 28 U.S.C. 2501 for actions in the Court of Federal Claims, a Fifth Amendment taking action based upon the effect of the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, Tit. II, 101 Stat. 1877, first accrued when that statute was enacted.

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OPINIONS BELOW

The opinion of the court of appeals in *Franconia Associates* v. *United States* is reported at 240 F.3d 1358. The opinions of the Court of Federal Claims in *Franconia Associates* are reported at 43 Fed. Cl. 702 and 44 Fed. Cl. 315. No opinion was issued by the court of appeals in *Grass Valley Terrace* v. *United States*. The opinion of the Court of Federal Claims in *Grass Valley Terrace* v. *United States* is reported at 46 Fed. Cl. 629 (2000).

JURISDICTION

The judgment of the court of appeals in *Franconia Associates* was entered on February 15, 2001. A petition for rehearing was denied on June 19, 2001. The judgment of the court of appeals in *Grass Valley*

Terrace was entered on May 17, 2001. On July 31, 2001, the Chief Justice extended the time for filing a petition for a writ of certiorari in *Grass Valley Terrace* to and including September 14, 2001. The petition for a writ of certiorari was filed on September 10, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Sections 515 and 521 of the Housing Act of 1949, 42 U.S.C. 1485, 1490a (1994 & Supp. V 1999), the Farmers Home Administration (FmHA) made direct loans to private, non-profit entities to develop and/or construct rural housing designed to serve the elderly and low- or middle-income individuals and families. Each petitioner entered into a loan agreement with the FmHA under Sections 515 and 521, "in order to provide rental housing and related facilities for eligible occupants * * * in rural areas." Pet. App. A165. The loan agreements contained various provisions designed to ensure that the projects would be affordable for low-income tenants. Those provisions included restrictions as to the tenants to whom the petitioners could rent, the rents petitioners could charge, and the rate of return petitioners could realize, as well as requirements regarding the maintenance and financial operations of each project. *Id.* at A165-A174. Petitioners all entered into their loan agreements before December 21, 1979. *Id.* at A3.

In connection with the loan agreements, each petitioner also executed a promissory note and a security instrument, ordinarily a mortgage. Those loan documents specified that petitioners must pay the principal on the mortgage in scheduled installments, plus interest. Pet. App. A176-A177. According to petitioners, those documents also provided petitioners with the

option of prepaying their mortgages and thereby discontinuing the low-income affordability restrictions, at any time. *Id.* at A112, A176. The note term upon which petitioners rely stated: "[p]repayments of scheduled installments, or any portion thereof, may be made at any time at the option of the Borrower." *Id.* at A176.

2. By 1979, many Section 515 participants had started to prepay their mortgages, thus threatening the continued availability of rural low- and moderate-income housing. Finding that it had been "the clear intent of Congress that these projects be available to low and moderate income families for the entire original term of the loan," Congress amended the National Housing Act to preclude the loss of low-cost rural housing due to prepayments. H.R. Rep. No. 154, 96th Cong., 1st Sess. 43 (1979). In the Housing and Community Development Amendments of 1979, Pub. L. No. 96-153, 93 Stat. 1101, Congress prohibited the FmHA from accepting prepayment of any loan made before or after the date of enactment unless the owner committed to maintaining the low-income features of the rental housing for either a 15-year or 20-year period from the date of the loan. § 502(b), 93 Stat. 1134-1135. The Act included an exception to that requirement for cases in which the FmHA determined that there was no longer a need for the low-cost housing or if federal or other financial assistance provided to residents would no longer be provided. *Ibid.*

In 1980, Congress further amended the National Housing Act to eliminate retroactive application of the Section 515 prepayment changes enacted in the 1979 legislation. The Housing and Community Development Act of 1980, Pub. L. No. 96-399, 94 Stat. 1614, provided that the prepayment restrictions included in the 1979 legislation would apply only to loans entered into after

the date of enactment of that legislation, December 21, 1979. § 514, 94 Stat. 1671-1672.

3. In 1987, Congress again became concerned about the availability of low-and moderate-income rural housing in the face of increasing prepayments of mortgages under Section 515. A House of Representatives Committee found that the exhaustion of many of the tax benefits available to Section 515 participants was "driving owners to prepay or to refinance their FmHA loans, without regard to the low income and elderly tenants in these projects." H.R. Rep. No. 122, 100th Cong., 1st Sess. Pt. 1, at 53 (1987).

In response, Congress passed the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA), Pub. L. No. 100-242, Tit. II, 101 Stat. 1877, which, *inter alia*, amended the Housing Act of 1949 to impose restrictions upon prepayment of Section 515 mortgages that were entered into before December 21, 1979. This legislation, enacted on February 5, 1988, required that before FmHA accepted an offer to prepay a mortgage entered into before December 21, 1979:

> the [FmHA] shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed.

Pub. L. No. 100-242, § 241, 101 Stat. 1886. The legislation further provided that the FmHA could include a number of enumerated incentives in such an agreement, including an increase in the rate of return on investment, reduction of the interest rate on the loan, and an equity loan. Pub. L. No. 100-242, § 241, 101 Stat. 1886-1887.

Under ELIHPA, if the FmHA determined after a "reasonable period" that an agreement would not be entered into, the FmHA would require the owner to offer to sell the housing to "any qualified nonprofit organization or public agency at a fair market value determined by 2 independent appraisers." Pub. L. No. 100-242, § 241, 101 Stat. 1887. If an offer was not made within 180 days, the FmHA could accept the offer to prepay or request refinancing. *Ibid.* The offer for sale requirement would not apply if (1) the owner agreed to utilize the housing for the purposes set out in Section 515 for a period designated by the FmHA and then offer to sell the housing to a nonprofit organization or public agency, or (2) the FmHA determined that housing opportunities for minorities "will not be materially affected" by prepayment and the housing tenants either will not be displaced by prepayment or there is an "adequate supply" of "affordable" housing in the market area available to displaced tenants. Pub. L. No. 100-242, § 241, 101 Stat. 1889.

The FmHA promulgated regulations to implement ELIHPA on April 22, 1988, and those regulations became effective on May 23, 1988. 53 Fed. Reg. 13,245 (1988) (7 C.F.R. 1965.90 (1989)).

4. In 1992, Congress passed the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (codified in relevant part at 42 U.S.C. 1472(c) (1994)) (the "1992 legislation"). That legislation amended the Housing Act of 1949 to apply the prepayment restrictions imposed upon pre-1979 Section 515 loans in ELIHPA to Section 515 loans made from December 21, 1979, until enactment of the 1989 legislation. Pub. L. No. 102-550, § 712, 106 Stat. 3841. In other words, after that statute was enacted, loans made after December 21, 1979 but before 1989 were subject

to the same provisions as those applied under ELIHPA to pre-1979 loans, such as those of petitioners.

5. Petitioners in *Franconia Associates* filed this action in the Court of Federal Claims on May 30, 1997. Petitioners alleged that ELIHPA and the 1992 legislation repudiated their loan contracts and effected a taking under the Fifth Amendment. The Court of Federal Claims granted the government's motion to dismiss the complaints on grounds that they were filed more than six years after they "first accrue[d]" and were therefore filed beyond the limitations period provided for by 28 U.S.C. 2501. Pet. App. A23. The court held that petitioners' contract claims first accrued on May 23, 1988, the effective date of regulations implementing ELIHPA. The court reasoned that "as of [that date], * * * borrowers could no longer prepay their contracts without first going through lengthy and onerous procedures," a result that "was clearly in contravention of the government's clear promise to allow an *unfettered* prepayment right." *Id.* at A29, A31. Because petitioners had not filed their action until 1997, their claims did not fall within the six-year statute of limitations under 28 U.S.C. 2501. Pet. App. A34. The court also, *sua sponte*, dismissed petitioners' taking claims, holding that those claims also accrued upon the effective date of regulations implementing ELIHPA. *Ibid.*

6. On February 15, 2001, the United States Court of Appeals for the Federal Circuit affirmed the lower court's dismissal of the *Franconia Associates* petitioners' claims. Pet. App. A1. The court of appeals explained that "FmHA's contractual duty in this case was to continue to allow borrowers the unfettered right to prepay their loans at any time." *Id.* at A10. The court found that, "[i]f that continuing duty was

breached, the breach occurred immediately upon enactment of ELIHPA, because, by its terms, ELIHPA took away the borrowers' unfettered right of prepayment." *Ibid.* Accordingly, plaintiffs' contract claims were barred because they had not been filed within six years of the enactment of ELIHPA. *Id.* at A9. The court of appeals also affirmed the trial court's dismissal of petitioners' taking claims, holding that ELIHPA "took away and conclusively abolished a material contract right"—"[petitioners'] unfettered right to prepay their FmHA loans at any time." *Id.* at A14. The alleged taking of which petitioners complained, therefore, occurred upon the enactment of ELIHPA. *Id.* at A14.[1]

7. Meanwhile, on September 16, 1998, the *Grass Valley Terrace* petitioners filed an action virtually identical to the *Franconia Associates* action in the Court of Federal Claims. On April 12, 2000, the Court of Federal Claims granted the government's motion to dismiss the claims of those petitioners. Pet. App. A45. The court reasoned that the "performance required of the Government was to allow the pre-1979 Plaintiffs the option to prepay at any time," and "the enactment of ELIHPA constituted an actual breach rather than an anticipatory repudiation because it immediately altered the right of [petitioners] to prepay at any time at their option." *Id.* at A55. Accordingly, the court held that the petitioners' claims accrued upon the enactment of

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[1] The court of appeals held that the district court had erred in holding that the cause of action accrued on the date the regulations took effect (May 23, 1988), rather than the date ELIHPA was enacted (Feb. 5, 1988). Pet. App. A12 n.3. Nothing in this case turns on that distinction, however, since petitioners took far more than six years to file their claims, regardless of which date is used.

ELIHPA, more than six years before petitioners filed their action. *Id.* at A58.

8. On May 17, 2001, the United States Court of Appeals for the Federal Circuit affirmed the lower court's dismissal of the *Grass Valley Terrace* petitioners' claims, in a brief *per curiam* order without opinion. Pet. App. A15.

ARGUMENT

The decisions of the court of appeals are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. a. Under 28 U.S.C. 2501, "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." That provision is "an express limitation on the Tucker Act's waiver of sovereign immunity." Pet. App. A8 (quoting *Hart* v. *United States*, 910 F.2d 815, 817 (Fed. Cir. 1998)). Accordingly, it must be strictly construed. *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 399 (1976). As the court of appeals explained, a cause of action first "accrues" for purposes of the Section 2501 statute of limitations "when all events have occurred which fix the government's liability." Pet. App. A8 (quoting *Kinsey* v. *United States*, 852 F.2d 556, 557 (Fed. Cir. 1988)).

In this case, all such events had occurred by February 5, 1988, the date that ELIHPA was enacted. Before that date, petitioners had entered into contracts that included an "unconditional promise on the part of FmHA to allow borrowers to prepay their loans * * * at any time." Pet. App. A10. By petitioners' own account (see Pet. 8), ELIHPA itself eliminated that

"unfettered" right, because it "drastically limited the circumstances under which the agency could accept" prepayments. After the enactment of ELIHPA, the law prohibited FmHA from "accepting any offer to prepay" until it had "ma[d]e reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing" for at least 20 years. 42 U.S.C. 1472(c)(4)(A). Moreover, if "after a reasonable period," no such agreement is possible, FmHA "shall require the borrower * * * to offer to sell the assisted housing" to "any qualified nonprofit organization or public agency at a fair market value determined by 2 independent appraisers." 42 U.S.C. 1472(c)(5)(A)(i). Finally, if no offer is made after 180 days, see 42 U.S.C. 1472(c)(5)(A)(ii), or if, regardless of the above process, FmHA determines "that housing opportunities of minorities will not be materially affected as a result of the prepayment" and certain other conditions are met, 42 U.S.C. 1472(c)(5)(G)(ii), it may accept the offer to prepay.

In light of the significant restrictions imposed by ELIHPA on petitioners' hitherto alleged "unfettered" right to prepay, their cause of action for a breach of contract accrued on February 5, 1988, the date on which ELIHPA was enacted. As of that date, the law eliminated their unfettered right to prepay and FmHA's ability to accept any tendered prepayment.[2] Petitioners had a full six years from that date in which to

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[2] Cf. *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980) (limitations period under Title VII dates from time that plaintiff was told he would be denied tenure, not date on which his employment was actually terminated); see also *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (per curiam) (applying *Ricks*).

file their claim for breach of contract. Because petitioners brought their actions more than nine years after that date, however, both courts below correctly concluded that they were barred by Section 2501's statute of limitations.

b. Petitioners contend (Pet. 15) that "[t]he Federal Circuit's decision in this case * * * rejects contract claims against the government as time-barred when indistinguishable claims brought against a private party would be deemed timely and heard on their merits." First, there is no reason that results under Section 2501 necessarily must mirror results in cases applying statutes of limitations to private parties. Section 2501 is a statute of limitations that applies solely to claims "of which the United States Court of Federal Claims has jurisdiction," 28 U.S.C. 2501, and it therefore applies only to claims against the government. Unlike statutes of limitations applicable to private parties, Section 2501 is a waiver of sovereign immunity, and thus it must be strictly construed. For those reasons, there can be no direct comparison between the limitations period applicable to the government under Section 2501 and the limitations period applicable to a private party.

In any event, the Federal Circuit simply applied settled principles governing the limitation of actions to the particular context of this case, in which a law had the effect of breaching a particular contractual term. Petitioners focus on the doctrine of anticipatory repudiation, which they claim (Pet. 17-21) the court of appeals misapplied. The court of appeals, however, did not misstate the legal principles relevant to the doctrine of anticipatory repudiation. The court of appeals expressly recognized the doctrine of anticipatory repudiation, see Pet. App. A10 ("An anticipatory repudiation occurs when an obligor communicates to an obligee that he will commit a breach in the future."), correctly stated its effect on statutes of limitations, see *ibid.* ("[T]he normal rule is that the statute of limitations begins to run from the date of performance specified in the contract unless the obligee elects to sue earlier for anticipatory repudiation."), and acknowledged its general applicability to the government, see *ibid.* ("[I]f the enactment of ELIHPA was not a breach, * * * then [petitioners'] claims did not accrue until some subsequent action by the government brought about an actual breach."). However, although it recognized the principles of law governing an anticipatory repudiation and their application to the government, the court of appeals simply found that ELIHPA did not constitute an anticipatory repudiation.

The court of appeals held that the doctrine of anticipatory repudiation does not apply in this case "because[] the enactment of ELIHPA constituted an alleged breach, rather than just a repudiation, of the obligation to allow prepayment of the FmHA loans at any time." Pet. App. A10-A11. This was not a case, analogous to most private anticipatory repudiation cases, in which a government official or agency simply announced that it was not going to honor a contractual obligation. In a case like that, the anticipatory repudiation doctrine has full force, because "[t]he plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation." A. Corbin, *Corbin on Contracts* § 989 (1964). The enactment of ELIHPA, however, differed substantially from an anticipatory repudiation.[3] After the enactment of

[3] Petitioners contend (Pet. 21) that the court of appeals "found that, although Petitioners had the right to prepay their mortgages

ELIHPA, the law no longer permitted petitioners to exercise an "unfettered right to pay their loans at any time." Pet. App. A10. Nor was it possible for the FmHA to change its mind and decide to accept prepayment, because any such action would have been illegal under ELIHPA. Because ELIHPA itself "took away the borrowers' unfettered right of prepayment," *ibid.*, the alleged breach took place when ELIHPA was enacted.[4] The court of appeals' rejection of petitioners'

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at any time, the government had no reciprocal duty to accept such prepayments when tendered by owners." The court of appeals did not make such a finding. The court did note that "the note's prepayment provision did not require any performance on the part of the government because it constituted an unconditional promise on the part of FmHA to allow borrowers to prepay their loans, an obligation which extended for the life of the loan." Pet. App. A10. In context, that statement simply made the point that the prepayment clause did not require any government performance *aside from* permitting petitioners to prepay their note. The court of appeals clearly recognized that, under the prepayment clause, petitioners "were allowed to prepay their indebtedness at any time," *id.* at A10, and that the government "breached that promise, if at all, through the enactment of ELIHPA," *id.* at A11. Indeed, if the court had believed that the government was under no contractual obligation to accept petitioners' prepayments, then the court would have had to hold that ELIHPA had no effect at all on petitioners' contractual rights.

[4] Citing the Ninth Circuit's decision in *Kimberly Associates* v. *United States*, 261 F.3d 864 (2001), petitioners argue that "the government was not acting in its capacity as the sovereign when it enacted ELIHPA," and what they term "the government's repudiation of Petitioners' contracts should not be afforded any special status simply because it came in the form of legislation." Pet. 16. *Kimberly Associates* concerned application of the "unimistakability doctrine," and in that context the Ninth Circuit believed it significant that the government "was not acting in a 'public and general' capacity" when it enacted ELIHPA. 261 F.3d at 870. This case, however, is not about the "unmistakability doctrine."

anticipatory repudiation theory, accordingly, was correct. Moreover, even if the court below mischaracterized the effect of ELIHPA, that particular application of law to fact would not warrant this Court's review.

c. Petitioners contend that the decision of the court of appeals is inconsistent with this Court's decision in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000). In that case, plaintiffs paid the government more than $156 million for mineral drilling leases that permitted them to drill "provided that [the plaintiffs] received exploration and development permissions in accordance with various statutes and regulations to which the lease contracts were made 'subject.'" *Id.* at 609. After plaintiffs had submitted drilling plans to the relevant government agencies, Congress passed a statute that added additional regulatory approval requirements. *Id.* at 611-612. The Court held that plaintiffs were entitled to restitution of the money they paid the government under the leases.

Petitioners argue (Pet. 18-19) that the Court in *Mobil* "recognized the critical distinction between the

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Nor does it concern the "sovereign acts" doctrine to which petitioners refer and which generally applies only when the government acts in a "public and general" capacity. See Pet. 16 n.12; see generally *United States* v. *Winstar*, 518 U.S. 839, 891-910 (1996) (plurality opinion). Instead, this case concerns the date of "first accrual" of a cause of action under 28 U.S.C. 2501. For that purpose, the court of appeals correctly recognized that there is an important distinction between a statute that itself breaches a contract by eliminating a contractual right and a government action that amounts merely to an anticipatory repudiation of the government's obligation to perform a contract. That remains true regardless of whether the statute or contract at issue satisfy the requirements of the unmistakability or sovereign acts doctrines.

enactment of legislation by Congress, which amounts to only an anticipatory repudiation of affected contracts, and the later *implementation* of that legislation by the contracting agency, which can result in an actual breach." Pet. 18-19. This Court, however, made no such distinction in *Mobil*. *Mobil* did not involve the application of a statute of limitations, and nothing in *Mobil* turned on whether the statute at issue there was an anticipatory repudiation or an actual breach of the government's contract. To the contrary, the Court explained that the controlling legal principle in *Mobil* was that "[i]f the Government said it would break, *or did break*, an important contractual promise, * * * then * * * the Government must give the companies their money back." 530 U.S. at 608 (emphasis added). Accord *id.* at 614 (noting that the government "concedes, as it must, that relevant contract law entitles a contracting party to restitution if the other party 'substantially' breached a contract *or* communicated its intent to do so") (emphasis added).

Because the governing legal standard in *Mobil* did not turn on whether the government had merely "said it would break" the contract or instead "did break" it, the Court had no occasion to examine the differences between an anticipatory repudiation and a breach. Accordingly, in the balance of the Court's discussion, the Court referred to "repudiation" and "breach" interchangeably. See, *e.g.*, 530 U.S. at 607 ("We agree that the Government broke its promise; it repudiated the contracts."); *id.* at 618 (statute "made clear * * * that the United States had to violate the contracts' terms and would continue to do so"). Similarly, although the Court in some places referred to the statute in *Mobil* as a "repudiation," see *e.g.*, *id.* at 620, 621, the Court in other places referred to the statute as

itself constituting a "breach" of the contract.[5] *Mobil* did not address the question presented by petitioners and provides no support for petitioners' claim here.[6]

2. The court of appeals correctly determined that petitioners' taking claims also accrued upon enactment of ELIHPA. As recognized by the court of appeals, liability for a taking "first accrues" under 28 U.S.C. 2501 when the property at issue is taken. *Seldovia Native Ass'n* v. *United States*, 144 F.3d 769, 774 (Fed. Cir. 1998). Here, the only "property" that could have been taken was petitioners' contractual prepayment right.[7]

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[5] See, *e.g.*, 530 U.S. at 618 ("We conclude * * * that the Government violated the contracts."); *id.* at 621 (stating that the government does not deny "that the United States repudiated the contracts *if* (as we have found) [the statute's] changes amounted to a *substantial breach*") (emphasis added); *id.* at 621 ("The breach was 'substantia[l],' depriving the companies of the benefit of their bargain.").

[6] Similarly, none of the other appellate cases on which petitioners rely (Pet. 19) concerned application of a statute of limitations, and the legal questions in each case concerned contract and statutory terms that differed substantially from those in this case. We note that one of the cases cited by petitioners, *Schism* v. *United States*, 239 F.3d 1280, 1290 (Fed. Cir. 2001), has been vacated pending en banc review. See *Schism* v. *United States*, 252 F.3d 1354 (Fed. Cir. 2001).

[7] Petitioners assert (Pet. 29) that they did not claim a taking of their contractual rights, but "a taking of their state-created real estate interests." By signing their contracts with the government, however, petitioners contracted away those "real estate interests." See Pet. 29 n.28 (referring to "the right to economically productive use and enjoyment, the right to exclusive possession, and the rights to transfer, devise, and dispose of their properties"). ELIHPA itself had no effect on petitioners' "real estate" interests; instead, it simply limited petitioners' contractual prepayment rights. It is not the case that every government violation of a con-

Leaving aside whether such a right necessarily constitutes property under the Fifth Amendment, but cf. *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 19 n.16 (1977), the contractual right at issue could have been taken only when the contract was breached. Because the contractual breach occurred when ELIHPA was enacted, it follows that any taking occurred simultaneously.

a. As an antecedent matter, petitioners' taking and contract claims are not distinct from each other, and accordingly, insofar as taking claims may be brought in this context at all, such claims necessarily "first accrue[]" at the same time as the contract claims. Cf. *Sun Oil Co.* v. *United States*, 572 F.2d 786, 818 (1978). Insofar as the government breached the contracts with petitioners, they had no independent takings claims because they had available a remedy in damages that was sufficient to provide "just compensation" under the Fifth Amendment. Insofar as the government did not breach the contracts with petitioners, they had no independent takings claims because their only rights were to the contractual performance that was in fact rendered by the government. See *Sun Oil Co.*, 572 F.2d at 818; see also *Transpace Carriers, Inc.* v. *United States*, 27 Fed. Cl. 269, 274 (1992); *Marathon Oil Co.* v. *United States*, 16 Cl. Ct. 332, 338-339 (1989). Because petitioners' taking claims are thus entirely parasitic on their contract claims, their taking claims necessarily "first accrued" at the same time as the contract claims did.

b. Petitioners contend (Pet. 24) that the court of appeals' holding is inconsistent with decisions in which,

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tract involving real estate is a "taking" of the underlying "real estate interest," as petitioners' contention would suggest.

according to petitioners, this Court has held "that a taking claim based on a statute or regulation that allows for a discretionary agency decision on the scope of permissible use of the property at issue is not ripe for review until the agency renders such a decision." As the cases cited by petitioners demonstrate, however, that rule applies to takings claims involving real property. See Pet. 25 (citing *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (alleged taking of real property containing wetlands); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (alleged taking of property rights in coal mines)). In such cases, the right at issue is not the right to be free of government restrictions, but the right to engage in the owner's desired use. Accordingly, the question whether that right has been taken cannot be determined until the agency has ruled on whether—and the extent to which—the owner may engage in the desired use of the property.

By contrast, this case arises in the entirely different context of an alleged taking of the contractual right consisting of the "unfettered right to prepay [petitioners'] FmHA loans at any time" as provided for in the prepayment clause, Pet. App. A14—*i.e.*, the right to be free of regulatory restrictions on prepayment altogether. As the court of appeals correctly held, if it took anything, ELIHPA "took away and conclusively abolished" that right because ELIHPA "prohibited FmHA from allowing unrestricted prepayments." *Id.* at A14.[8]

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[8] Petitioners contend (Pet. 25) that ELIHPA did not take their contract right because it permits owners to prepay if FmHA determines that several conditions are satisfied concerning housing opportunities of minorities and the availability of replacement housing for tenants. Petitioners err (Pet. 27) in characterizing that limited ability of FmHA to accept a prepayment as an ability "to

Accordingly, petitioners' taking claims accrued when ELIHPA became law. Because petitioners waited more than six years from that date before filing their claims, they were time-barred.

c. Contrary to petitioners' contention (Pet. 26-27), the court of appeals' decision does not conflict with its own prior decision in *Greenbrier* v. *United States*, 193 F.3d 1348 (Fed. Cir. 1999), cert. denied, 530 U.S. 1274 (2000). In *Greenbrier*, the court of appeals held that the claims of HUD-insured housing owners alleging that ELIHPA and other legislation effected a taking were not ripe because plaintiffs had not applied to the agency to prepay their loans. *Id.* at 1360. Unlike in this case, the plaintiffs in *Greenbrier* "were not in privity of contract with respect to the notes' prepayment," because the government was not a party to the prepayment provisions of the notes. *Id.* at 1355. Whatever private contracts they had signed concerning their prepayment rights were thus necessarily conditioned by the possibility of legislation that subjected their prepayment rights to some degree of government regulation. Because the plaintiffs claimed a "regulatory taking," see *id.* at 1357, their claim that their contract rights had been subject to such a taking was not ripe until the precise restriction imposed on their prepayment rights by government regulation became clear.

This case arises in the very different setting in which both petitioners and the government were parties to the contracts at issue, including the prepayment provi-

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accept prepayment requests without restriction." After ELIHPA, there are always restrictions on prepayments rights; one of them is a restriction on the right to prepay unless the specified statutory findings have been made. Accordingly, as the court of appeals recognized, ELIHPA eliminated their "unfettered right to prepay their FmHA loans at any time." Pet. App. A14.

sions. Unlike the plaintiffs in *Greenbrier*, petitioners obtained a clause granting them what they claim to have been an "unfettered right to prepay," Pet. App. A14—*i.e.*, a government promise not to impose any regulatory restrictions on their ability to prepay at any time, at their option. See Pet. 20 ("Petitioners' contracts granted them the option to prepay their mortgages at any time that they desired during their fifty-year mortgage terms."). That contract right differed substantially from the contract right at issue in *Greenbrier*, where no such promise *by the government* could be found. Accordingly, while the regulatory taking claim in *Greenbrier* was not ripe until the scope of the regulatory restriction on the private contract became clear, the taking claim in this case became ripe as soon as the government enacted ELIHPA, which itself allegedly eliminated petitioners' alleged contractual right to be free of government-imposed conditions on their prepayments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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